89- 1444
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

vs.

FIRST SECURITY BANK OF UTAH, N.A., as Personal Representative of the Estate of Velma Rife Jones (deceased), et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a trust beneficiary notice of a judicial proceeding required for approval of the sale of property which is obligated to the trust where the trustee, by virtue of his contemporaneous duties to others, serves interests which are in conflict with those of the trust.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Petitioner is a remainderman of a charitable remainder unitrust established in the will of Velma Rife Jones. The Petitioner has no parent or subsidiary corporations.

The respondent parties to this action are: First Security Bank of Utah, N.A., which serves as co-personal representative of the Estate of Velma Rife Jones and trustee of the charitable remainder unitrust; First Security Bank of Rock Springs, which serves as co-personal representative of the Estate of Velma Rife Jones pursuant to the Wyoming ancillary administration; and the purchasers of the Rife Ranch from the Estate of Velma Rife Jones: the Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole.

The University of Utah is also a remainderman of this testamentary charitable remainder unitrust but is not a party to this action. Darrell Rife Mork, the life income beneficiary of the unitrust, is deceased and is not a party to this action.

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Shriners Hospitals for Crippled Children, a Colorado charitable corporation, petitions for a writ of certiorari to review the judgment of the Supreme Court of Wyoming in this case.

OPINIONS BELOW

The original opinion of the Supreme Court of Wyoming is reported at 770 P.2d 1100 (App. A, *infra*). The Wyoming Supreme Court's opinion on rehearing is reported at 782 P.2d 229 (App. B, *infra*). The opinion of the District Court in and for Sweetwater County, Wyoming is not officially reported (App. C, *infra*).

JURISDICTION

The initial decision of the Supreme Court of Wyoming in this matter was issued on March 21, 1989. (App. A.) After rehearing, the Supreme Court of Wyoming modified its opinion on November 15, 1989. (App. B.) On January 31, 1990, the Honorable Byron R. White, Circuit Justice for the Tenth Circuit, extended the time for filing a Petition for a Writ of Certiorari to March 15, 1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) as the decisions rendered by the Supreme Court of Wyoming are repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portion of the Constitution of the United States, Amendment 14, Section 1, and Wyoming Statutes 2-7-202, 2-7-205, 2-7-614, 2-7-615, and 2-7-620 are set out in Appendix D.

STATEMENT

Velma Rife Jones, a resident of Utah, died testate on October 19, 1986, leaving a sizable estate. (App. A 2; R. 1[1].) The bulk of the estate took the form of an approximately 40,000-acre parcel of fee and leased real property located in Wyoming and widely known as the Rife Ranch. (App. A 3; R. 1-4.)

Mrs. Jones' last will and testament provided general bequests of $10,000 each to six cousins. (App. A 2; R. 13.) With respect to the residue of her property, the will created a charitable remainder unitrust[2] under which Mrs. Jones' sister, Darrell Rife Mork (who was 81 years old on the date of Velma Rife Jones' death), was named the life income beneficiary. (App. A 2-3.) Mrs. Darrell Rife Mork died during probate of the Jones estate. (R. 13-24.) Two charitable organizations, Petitioner, Shriners Hospitals for Crippled Children,[3] and the University of Utah,

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[1] "R. ____" denotes references to the original record of District Court proceedings filed in the Supreme Court of Wyoming.

[2] A charitable remainder unitrust is a trust established pursuant to Section 664(d)(2) of the Internal Revenue Code. For a trust to qualify for the benefits of this provision, a fixed percentage (not less than 5% of the net fair market value of its assets) must be paid, at least annually, to one or more non-charitable persons, for life or a term certain. Following the termination of the above-mentioned payment (usually caused by the death of the life income beneficiary) the remainder interest of the trust must be transferred to, or held for the use of, a qualified charitable organization. *See generally* Swados, *Charitable Remainder Trusts—Drafting and Valuation Guidelines*, 29 N.Y.U. Inst. on Fed. Tax. 2023 (1971). Pursuant to § 2055(a)(iii) of the Internal Revenue Code, the Estate of Velma Rife Jones claimed a tax deduction for the unitrust of $875,037.73. (R. 862.)

[3] Shriners Hospitals for Crippled Children (hereinafter "Shriners Hospitals") is a charitable institution which operates 20 free hos-

(Footnote continued on following page)

were named the remainder beneficiaries of the unitrust. (R. 16.) The will named First Security Bank of Utah as trustee of the testamentary unitrust. (R. 13.) In addition to its responsibilities as trustee, responsibilities which included protecting the interests of the beneficiaries of the unitrust, First Security Bank of Utah also served as co-personal representative of the estate of Velma Rife Jones. First Security Bank of Rock Springs (Wyoming) also served as co-personal representative of the Estate of Velma Rife Jones in connection with all proceedings concerning the Rife Ranch. (App. A 2-3.)

Although Mrs. Jones' will provides that the estate's obligation to pay the unitrust amount commences on the day of her death, the estate first had to pass through probate proceedings in both Utah, the state in which Mrs. Jones resided, and in Wyoming, the state in which the ranch is located. Nevertheless, despite Shriners Hospitals' property interest, it was not notified of either the Utah or Wyoming probate proceedings. Indeed, Petitioner did not even learn of the existence of the trust or its assets until after the Rife Ranch had been sold by the co-personal representatives.

Soon after the Jones will was admitted to probate, the co-personal representatives took action to sell the Rife Ranch to a group of local investors. Significantly, in the

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[3] *continued*
pitals in 16 states. It is devoted to providing free care to children with orthopaedic defects or diseases and children suffering from serious burn injuries. In 1988 Shriners Hospitals provided free inpatient and outpatient care at a cost of approximately $172 million. These services were funded by charitable contributions and earnings from endowment assets. Substantially all contributions to Shriners Hospitals' are from decedents who make outright or deferred gifts. R. Robertson, *Reports: Shriners Hospitals For Crippled Children* (1988).

filing to commence probate, First Security Bank of Utah, as the personal representative of the estate, estimated the value of the Rife Ranch at $1.2 million. (R. 1-5.) This figure, which appears to have been based on a November 1985 appraisal of the Rife Ranch (R. 265.), did not purport to account for the subsurface mineral rights associated with the property.[4] Nonetheless, the co-personal representatives decided to effect a private sale of the Rife Ranch including its mineral rights for $820,000. Pursuant to that effort, the co-personal representatives filed a petition with the District Court in and for Sweetwater County, Wyoming seeking judicial approval of the private sale as is required by Wyoming law. *See* Wyo. Stat. 2-7-614. (R. 54-61.) In that petition the co-personal representatives asserted to the court that proper notice of the hearing had been provided to the beneficiaries of the $10,000 general bequests and to the trustee of the unitrust.[5] (App. A 4; R. 38.) Neither the life income beneficiary nor any of the charitable remaindermen were given formal notice of the petition for approval of the sale of the Rife Ranch.[6]

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[4] "No detailed search of the records was undertaken to ascertain the exact status of mineral rights of the subject property." (R. 265.) *See also* n.8, *infra.*

[5] In other words, the First Security Bank of Utah represented to the court that it had given notice to itself, as trustee of the unitrust, of its intent to sell the Rife Ranch.

[6] According to W. John Lamborne, Vice President and Trust Officer of the First Security Bank of Utah, both Darrell Rife Mork, the life income beneficiary, and the University of Utah, the co-remainderman, were informed of the Respondents' intention to sell the Rife Ranch prior to filing of the petition for approval of the sale; both beneficiaries informally consented to the proposed sale. (R. 499.) Shriners Hospitals was not consulted about the proposed sale and, in fact, was not aware of the existence of the unitrust until after the sale.

(App. A 4.) The petition also represented to the court that the beneficiaries of the unitrust, including Shriners Hospitals, had "no desire to own or operate the Rife Ranch" and that sale of the Rife Ranch was necessary to provide liquid assets to satisfy the estate's debts and the "costs of administration" of the estate. (R. 57.)

On May 19, 1987, a hearing concerning the proposed sale of the Rife Ranch was held before the District Court in and for Sweetwater County, Wyoming. Since Petitioner was not notified of the proceeding to sell the Rife Ranch, it had no opportunity to challenge the Respondents' assertion that Petitioner as an ultimate beneficiary of the property had "no desire to own or operate the Rife Ranch." (R. 57.) Nor did Petitioner have the opportunity to challenge Respondents' claim that sale of the Rife Ranch was required to provide liquid assets for the payment of the estate's debts and for the "costs of administration" of the estate.[7] (R. 57.) Nor did it have the opportunity to challenge the sale price of $820,000 and to point out to the court just how far below market value that price was, especially when mineral interests are considered along with their potential benefit to the trust in the future. With no one challenging the proposed sale, on May 19, 1987, the Wyoming District Court entered an order summarily approving the sale of the Rife Ranch. (R. 94-98.)

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[7] Given the opportunity, Shriners Hospitals' would have explained to the District Court, that the estate had liquid assets in the amount of $378,765 and liabilities in the amount of $269,825. (R. 721, 766-768.) Petitioner would have argued, as it later did, that these figures suggest that something other than liquidating assets motivated the Respondents when they agreed to sell the Ranch to the group of local investors through a private sale.

Approximately two months later, the Petitioner learned fortuitously from a third party that it was a beneficiary under Mrs. Jones' will and that the Rife Ranch had been sold, with court approval. Petitioner filed a Motion for Relief under Wyoming Civil Procedure Rule 60(b), asserting that the court's approval of the sale without notice to the charities whose property interests were so directly affected, violated both Wyoming Statute 2-7-205(b) (App. D 2.) and the Due Process Clause of the United States Constitution. (R. 131-136, 142-166, 718-765.) The District Court denied the motion without addressing the constitutional challenges. (App. C; R. 596-601, 900.)

By a three to two vote, the Wyoming Supreme Court affirmed the District Court's denial of the 60(b) motion. (App. A.) The Wyoming Supreme Court held that Shriners Hospitals had no right to notice under Wyoming statutory law or the United States Constitution. In its initial opinion issued March 21, 1989, the court rested its analysis on its conclusion that Petitioner's remainder interest was contingent, not vested. The interest, the court reasoned, was contingent because Shriners Hospitals might not qualify as a charitable organization on the date the life beneficiary dies. (*Id.* at 8.) Chief Justice Cardine, joined by Justice Rooney, dissented, arguing both that notice to the remaindermen was required under Wyoming law and that approval of the sale of the Rife Ranch without notice to Shriners Hospitals violated its right to due process of law. (*Id.* at 9-10.)

The Wyoming Supreme Court modified its opinion on rehearing on November 15, 1989, concluding that its categorization of Petitioner as a contingent beneficiary was not necessary to its holding that Wyoming law did not require notice. (App. B 2-3.) The court held that the Wyoming statute which requires notice to those beneficiaries

"named in the will" did not require notice to Shriners Hospitals because "any beneficiary of *a trust created in a will* is not a beneficiary of the will for purposes of the notice requirements" of Wyoming law. (App. B 3.) Although the majority of the court did not address the due process question, Justice Rooney dissented, for the reasons articulated in his and Chief Justice Cardine's earlier dissent. (App. B 4.)

REASONS FOR GRANTING THE PETITION

This Court has repeatedly recognized that the "elementary and fundamental requirement of due process" is notice to a party whose rights are about to be adjudicated. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). There is no more settled principle than the proposition that "notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable." *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 800 (1983).

This case presents the Court with an opportunity to reiterate the central role that notice and the right to be heard play within the due process framework. Specifically, this case provides the Court with a vehicle to declare that a trust beneficiary is constitutionally entitled to notice of proceedings adjudicating its interests when it is apparent that the trustee is laboring under a conflict of interest. In such instances a number of lower courts, and,

indeed, this Court in *Mullane*, have held that notice to the beneficiaries is required. The Wyoming Supreme Court's decisions of March 21, 1989, and November 5, 1989, in this matter are in direct conflict with those decisions.

On a practical level, there is a critical need for this Court to grant review and protect the interests of trust beneficiaries, in general, and charitable trust beneficiaries, in particular. The facts of this case demonstrate the great risks of abuse inherent in any system that does not provide a party—in this case the beneficiary—the opportunity to represent and protect its interests in a judicial proceeding.

I.

THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION GUARANTEES A TRUST BENEFICIARY THE RIGHT TO NOTICE BEFORE A COURT APPROVES THE SALE OF ASSETS OBLIGATED TO THE TRUST IN A PROCEEDING IN WHICH THE BENEFICIARY'S INTERESTS ARE NOT ADEQUATELY REPRESENTED.

A party claiming that its rights to due process were violated must establish two central elements. It must establish, first it had a constitutionally protected interest in the matter at issue, and second, that the notice that it received, if any, was inadequate. Both of these propositions are unmistakably present in this case. The Petitioner had a constitutionally protected property interest at stake, yet because it was not given notice of the proceeding, it is clear that its interests were never represented before the Wyoming District Court.

A. As an ultimate beneficiary of the trust, Petitioner has a constitutionally protected property interest in the assets of the trust.

The Wyoming court's order permitting the sale of the Rife Ranch directly affected the Petitioner in two independent ways. First, it significantly decreased the value of the Petitioner's interest in the trust. Second, it diluted, and may have even extinguished, Shriners Hospitals' opportunity to recoup this lost value in a suit against the trustee for its mismanagement of the trust's assets. Either of these property interests is sufficient to trigger the protections of the Due Process Clause.

1. The order of the District Court in and for Sweetwater County, Wyoming approving the sale of the Rife Ranch significantly decreased the value of Petitioner's interest in the trust.

Immediately prior to the Wyoming District Court's order that the Rife Ranch be sold, Shriners Hospitals stood to receive a one-half interest of the Rife Ranch. The surface rights alone had been appraised at $1.2 Million. Upon sale of the Rife Ranch, Shriners Hospitals stood to receive a one-half interest of $820,000, 30% less than the appraised value of the surface rights of the Rife Ranch.[8] The record establishes that the Rife Ranch was intentionally sold by the co-personal representatives at a price that was well below its fair market value. Nonetheless, Shriners Hospitals was never afforded the opportunity to

[8] The 1985 appraisal of the property stated that "[w]ith the upsurge of oil and gas exploration in the area the past few years, there is currently a trend for owners/sellers to reserve unto themselves the mineral rights." (R. 266.) No such rights were reserved when the Rife Ranch was sold.

present its arguments against the private sale of the Rife Ranch. Indeed, Shriners Hospitals was not permitted to present evidence or take discovery even after the sale had been ordered. It was never even given an explanation by the Wyoming Supreme Court as to why Petitioner's due process objections did not prevail.[9]

This Court has recognized the obvious property interest that beneficiaries of a trust have in the assets of the trust. In *Mullane*, the Court struck down a New York statutory procedure through which trustees obtained judicial validation of the acts they had carried out during the preceding months. The flaw in the procedure was that the beneficiaries of the trust were not entitled to notice of the judicial proceeding, even though, as the Court recognized, the proceedings threatened to diminish the absent beneficiaries' property interests in the corpus of the trust. *Mullane*, 339 U.S. at 313. "Certainly," the Court noted, "the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up

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[9] The Wyoming Supreme Court's silence on the due process issue suggests that it may have treated its conclusion that the statutes of Wyoming did not afford Petitioner the right to be notified as dispositive on the Petitioner's due process claim. Perhaps the Court was acting on the mistaken belief that the scope of a constitutional property interest is "defined by the procedures provided for its deprivation" by the state. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 541 (1985). This Court has, of course, repeatedly rejected this position, explaining that:

> it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.

Id.

to the standards of due process." *Id.* Similarly, it is beyond question that Shriners Hospitals for Crippled Children's property interests were directly affected by the decree that the Wyoming District Court entered in its absence.[10]

2. The order of the District Court in and for Sweetwater County, Wyoming significantly decreased the value of Petitioner's potential cause of action against the trustee.

In addition to the effect of the judicial sale on Petitioner's interest in the Rife Ranch and the funds of the trust, the court order diluted, and may even have extinguished, Petitioner's opportunity to recover from the trustee for losses to the trust resulting from the sale of the Rife Ranch. This is due to the fact that the order approving the sale of the Rife Ranch may operate to insulate the trustee from attack. This Court's decisions in *Mullane* and in a number of more recent cases establish that this dilution of Petitioner's cause of action constitutes a deprivation of Petitioner's property which may not constitutionally be decreed in a proceeding of which it was never notified.

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[10] Petitioner's interest in the property is enhanced by its established corporate policy of taking in kind substantial interests in farm and ranch real property that is given or devised to it. In line with this policy, Petitioner administers a substantial number of farm, ranch, and mineral properties in diverse locations through its professional managers. (R. 722-723.) This is directly contradictory to the co-personal representative's statement to the District Court that the Shriners Hospitals had no interest in ultimately operating the Rife Ranch. (R. 57.) Of course, because Petitioner had no notice of the judicial proceeding it had no way of apprising the court of its vast experience in administering property which should have been highly relevant to a determination of whether the trust would benefit from the sale of the Rife Ranch.

The traditional justification for allowing a trustee to manage the assets of a trust without the assent of the beneficiaries is that the beneficiaries retain the right to sue the trustee for mismanagement of trust assets. *See Dallas Dome Wyoming Oil Fields Co.* v. *Brooder*, 55 Wyo. 109, 97 P.2d 311 (1939) (recognizing this cause of action under Wyoming law). In some cases, the beneficiaries may even be able to have the wrongful act of the trustee set aside. *See generally* G. Bogert, *Trusts and Trustees* § 861 (rev. 2d ed. 1977). Parallel principles of trust law provide, however, that a beneficiary may be barred from bringing a cause of action against the trustee for management decisions which have been specifically approved of by court order. *See Restatement (Second) of Trusts* § 220 (1959); *Scott on Trusts* § 220 (4th ed. 1987); *Dennis* v. *Rhode Island Hosp. Trust Nat'l Bank*, 571 F.Supp. 623 (D.R.I. 1983), *aff'd*, 744 F.2d 893 (1st Cir. 1984).

Indeed, Respondents have already argued before the Wyoming Supreme Court that a Wyoming statute forbids any subsequent challenge to the District Court's order concerning the sale of the Rife Ranch. (R. 195-227.) Wyoming Statute § 2-7-620 provides that "[n]o proceedings for sale . . . by a personal representative of property belonging to the Estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the Court of jurisdiction." *Id.* In their brief before the Wyoming District Court, Respondents have also asserted that this provision bars the Petitioner from seeking any redress for the injuries it suffered by virtue of the sale. (R. 195-227.) Whether or not the statute absolutely bars a subsequent action against the trustee, it seems clear that the judicial decree approving the sale of the property may have some significant effect on Petitioner's cause of action against the trustee. Yet, despite

the possibility of such diminishment of its rights, Petitioner was never given notice of the proceeding.

As the Court recognized in *Mullane*, Shriners Hospitals may not be deprived of the property interest it has in its cause of action against the trustee except in accordance with the requirements of due process. Indeed, like *Mullane*, there are two distinct property interests to which the protections of due process apply in this case: the property interest in the trust and the property interest in the right to sue the trustee. As the Court observed in *Mullane*, in addition to the effect that the judicial proceeding could have on the corpus of the trust there, the proceeding threatened to "cut off the [beneficiaries'] rights to have the trustee answer for negligent or illegal impairments of their interests." 339 U.S. at 313.

The Court has recently had occasion to reaffirm the principle that potential causes of action constitute protected property interests. In *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U.S. 478 (1988), the Court held that an unsecured creditor's claim against an estate was entitled to constitutional protection, and explained that:

> Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment. As we wrote in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), this question 'was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.'

485 U.S. at 485.

To be sure, the effect on a beneficiary's right of action against the trustee may be less dramatic here than in

Mullane.[11] Nevertheless, this Court has held that the government must comply with the dictates of due process whenever an individual's property interest may be subject to diminution even if it will not be extinguished in its entirety. In *Mennonite Bd. of Missions* the Court invalidated the judicial sale of real property which had been carried out in the absence of notice to a mortgagee. In holding that the mortgagee had a constitutionally protected property interest, the Court explained that the "tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors." 462 U.S. at 798. Here, too, the judicial sale of the Rife Ranch has "immediately and drastically" diminished the value of the Petitioner's cause of action against the trustee for mismanagement. Like the property holders in *Mullane* and *Mennonite Bd. of Missions*, the Petitioner had a constitutional right to be notified of proceedings which could so dramatically affect its interests.

B. The trustee's participation in the sale of the Rife Ranch provided Petitioner no protection or representation and did not satisfy the dictates of due process.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be noti-

[11] Under the New York law involved in *Mullane* the rights that "beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree." 339 U.S. at 311.

fied.' " *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972), quoting *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223 (1863). Here, Petitioner's property rights were most certainly affected when the Rife Ranch was sold at a well-below-market price and its right to challenge the trustee's acquiescence to the sale was diluted. It is clear, as well, that the Petitioner was never notified of the proceeding that affected its property rights in this fashion. The only conceivably open question, therefore, is whether the trustee's involvement in the proceeding obviated the need for notifying the named beneficiaries. Given the obvious conflict of interest of the trustee who also served as co-personal representative of the estate, it is clear that notice to the trustee was inadequate to satisfy constitutional due process and that the Wyoming Supreme Court's decisions must be overturned.

In *Mullane*, the Court acknowledged the general principle that the trustee often acts as "a resident fiduciary" and "as caretaker" of the beneficiaries' interest in the trust's property. 339 U.S. at 316. This general principle has traditionally provided the justification for empowering a trustee to litigate on behalf of the trust in the ordinary course of trust business. Yet, the Court in *Mullane* understood the need to look beyond the labels and official duties and to focus on the realities of the relationship between the trustee and beneficiary in the particular proceeding. Hence, the Court recognized that because of the trustee's strong personal interest in vindicating his actions, where the trustee seeks an accounting of the trust, its interests are adverse to those of the trust beneficiaries. "It is their caretaker who in the accounting becomes their adversary." *Id.* at 316. A trustee simply cannot adequately represent the interests of the trust beneficiaries where its own interests are adverse. Any notion that the trustee's representation in such situations is adequate is at

best a fiction, and at worst a sham. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Id.* at 315.

Here, as in *Mullane*, there is a serious conflict of interest between the trustee and the beneficiaries. To begin with, as co-personal representative of the estate, First Security Bank of Utah was *required* to promote the interests of the legatees and pay the debts and administrative expenses (including its own fees). By contrast, in its capacity as trustee of the testamentary trust, the First Security Bank of Utah was *required* to consider only the respective interests of the income beneficiary and charitable remaindermen of the charitable unitrust.[12] Because of the clear divergence of interests between these two constituencies, it was obviously impossible for the First Security Bank of Utah to satisfy both of its duties.

First Security Bank of Utah's conflict of interest went deeper than this. The petition for the sale of the Rife Ranch,

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[12] The vice-president of the First Security Bank of Utah alleged a conflict existed between the income beneficiary and the remaindermen here. In an affidavit presented to the Wyoming court, the Vice President and Trust Officer of the First Security Bank of Utah alleged that he had numerous discussions with the life beneficiary, Mrs. Mork (age 81), who "consistently stated that her preference was for a sale of the Rife Ranch as expeditiously as possible so that the trust would have funds to invest *for her benefit as the income beneficiary*." (R. 499.) (emphasis added). This one-sided approach to administration of the trust is incongruous with that balanced investment plan contemplated by Velma Rife Jones ("Investment need not be diversified and may be made or retained with a view to possible future increase in value, notwithstanding the amount or absence of income therefrom.") (R. 18.) This tension between the life beneficiary's interest in immediate income and the petitioner-remainderman's long-term interests provides a classic example of a case in which the trustee cannot possibly represent all divergent interests.

filed by the co-personal representatives, stated that the sale was necessary to "pay the costs of administration of the estate." (R. 57.) The trustee representing the interests of the beneficiaries was duty bound to question this assertion, that is to determine, whether the assets of the trust were being diminished by unreasonable administrative costs and whether the sale was in fact necessary to serve its purported ends. Of course, the trustee in this case, the First Security Bank of Utah, was not about to engage in any of this scrutiny, for it, itself, was one of the entities proposing the sale and at the same time receiving fees for administering the estate. It is farcical to conclude that the First Security Bank of Utah's involvement as trustee afforded Petitioner any meaningful protection against the improper actions of the First Security Bank of Utah as co-personal representative.

Many courts have recognized the fallacy of assuming that a trustee who is laboring under a conflict of interest can adequately protect, or provide "virtual representation" for, the interests of the beneficiary. Some of these courts have premised their decisions on constitutional due process, but most have cut the analysis off before reaching the constitutional issue by holding that the absent beneficiaries are indispensable parties to the proceeding,[13] or by holding that state law otherwise requires notification to the beneficiaries. For example, in *Hansen* v. *Peoples Bank of Bloomington*, 594 F.2d 1149 (7th Cir. 1979), the income beneficiary of a spendthrift trust had brought an action seeking dissolution of the trust. The plaintiff's chil-

[13] It has been recognized that the prejudice element of the indispensable party inquiry has a distinct due process component. *See generally* 7 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1602, at 21-22 (1986).

dren, who were destined to receive the trust after the plaintiff's death, objected to the termination of the trust. The Seventh Circuit held that the children were indispensable parties to the action because they stood to lose so much and because no one who was party to the action, including the trustee, was representing their interests. The Court explained that "[a]lthough cases have found a trustee adequate to represent the interests of beneficiaries in suits brought on behalf of the trust against third parties, this should not hold true in a contest essentially between the remaindermen and the income beneficiaries of a trust." *Id.* at 1153. *See also Koch* v. *Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987) (children are indispensable parties when there is a conflict of interest between their interest and the interest of their guardian).

Similarly in *Wichita and Affiliated Tribes of Okla.* v. *Hodel*, 252 U.S. App. D.C. 140, 788 F.2d 765 (D.C. Cir. 1986), the court held that an Indian tribe could not sue the United States for distribution of a trust unless all other beneficiaries of the trust were made parties to the action. The court acknowledged the general principle that the United States, in its capacity as trustee, typically is capable of representing Indian interests, but also recognized that in the case before it:

> whatever allegiance the government owes to the tribes as trustee, is necessarily split among the three competing tribes involved in the case. This case, therefore, falls squarely under the rule that when 'there is a conflict between the interest of the United States and the interest of Indians, representation of the Indians by the United States is not adequate.' *Manygoats* v. *Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *see also New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121, 975 S. Ct. 1157, 51 L.Ed.2d 572 (1977); *Hansen*

v. *Peoples Bank of Bloomington*, 594 F.2d 1149 (7th Cir. 1979).

252 U.S. App. D.C. at 150, 788 F.2d at 775.

Other courts have deemed the representation of a conflict-ridden trustee invalid on general state law grounds, although these decisions have been based on identical factors to those that make up the due process inquiry. The facts of one such case, *Azarian* v. *First Nat'l Bank of Boston*, 383 Mass. 492, 423 N.E.2d 749 (1981), are quite similar to the facts of the case at bar, although the holding of the Wyoming Supreme Court is thoroughly at odds with the holding of the Supreme Judicial Court of Massachusetts. Much like the instant case, the executor of the estate in *Azarian* sought allowance of accounts in the state court and the trustees of the trust which received the residue of the estate did not object. Furthermore, just as in the instant case, the actual beneficiaries of the trust in *Azarian* were never provided notice of the proceeding. Most significantly, just as in the instant case, one of the trustees who approved of the executor's accounts was the executor itself.[14] Unlike the Wyoming Supreme Court below, however, the Supreme Judicial Court of Massachusetts recognized the grave dangers this situation presented to the beneficiaries: "It is common ground that an accounting executor cannot bind the beneficiaries of the trust by his assent as trustee to his own account as executor." 383 Mass. at 494, 423 N.E.2d at 750. Hence,

[14] Indeed, the case at bar presents a more egregious illustration of the risk of abuse than *Azarian*. In *Azarian* other trustees who were not laboring under a conflict of interest also approved of the executor's accounts. In Petitioner's case the proposed sale of the Rife Ranch was not approved by any trustee who was not operating under a conflict of interest.

that Court declared that "justice will be served if the matter is reopened to give the beneficiaries their day in court." 383 Mass. at 494, 423 N.E.2d 751. *See also In the Matter of the Estate of Wiswall*, 11 Ariz.App. 314, 321, 464 P.2d 634, 641 (1970) ("Despite a trend favoring trustee representation, in civil actions, a trustee is not permitted to represent a beneficiary where the two have conflicting interests."); and G. Bogert, *Trusts & Trustees*, § 593, at 423-425 (2d rev. ed. 1977) ("where the trustee has an interest adverse to that of the beneficiary, . . . the beneficiaries must be brought into the action.")

Because they have required notice to the beneficiaries on state-law grounds, informed by the Court's decision in *Mullane* and other due process cases, these courts have not needed to rely directly on the Due Process Clause of the Fourteenth Amendment. Nevertheless, some courts have based their decisions on the Due Process Clause. For example, in *Estate of Lacy*, 54 Cal.App. 3d 172, 126 Cal.Rptr. 432 (1975), the court invalidated an accounting proceeding in which the remainder beneficiaries of a trust had not been provided actual notice. Although the remainder beneficiaries were "represented" by their mother, who had been appointed guardian *ad litem* for them, the court held that the mother could not adequately represent the children because of her conflicting interest as a life beneficiary of the trust. The court noted that "the grounds of contest alleged show that, as a matter of law the remaindermen are asserting issues directly contrary to the interests of the income beneficiaries." 54 Cal.App. 3d at 185, 126 Cal.Rptr. at 441. Relying on *Mullane*, and a number of California decisions, the court held that notice to the individual remaindermen was necessary if their addresses were known. *See also In re Trust Created by Hormel*, 282 Minn. 197, 163 N.W.2d 844 (1968) (due process

required joinder of the beneficiaries). Of course, the most critical decision requiring notice to beneficiaries as a matter of due process is *Mullane* itself.[15]

The foregoing discussion of the serious conflict between the First Security Bank of Utah's responsibilities as both co-personal representative and as trustee (not to mention its direct financial interests) reveal that it is imperative that this Court review the Wyoming Supreme Court's ruling in order to restore stability to this area of law, and to ensure that trust beneficiaries will be provided the protection that the Constitution affords them. Simply put, because of the conflict of interest that has been discussed above, there is no doubt that Petitioner's interests were not represented before the Wyoming court.

If any doubts remain about the need for review, however, they are surely erased once the potential impact of the proceeding on Petitioner's potential cause of action against the trustee is taken into consideration. For there can be no more blatant conflict of interest than where, as here, the party who ostensibly protects the interests of the beneficiaries is by virtue of his own actions, diluting the beneficiaries' potential cause of action against him. As the Court recognized in *Mullane*, in this type of case the supposed "caretaker" is, in fact, the actual "adversary." 339 U.S. at 316.

The effect that financial self-interest has on the due process analysis has been noted by this Court in a variety of contexts before and after *Mullane*. Whether deal-

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[15] In virtually all respects this case is directly controlled by *Mullane*. Indeed, the conflict between *Mullane* and the case at bar is so great that it may be appropriate for this Court to summarily reverse the judgment of the Wyoming Supreme Court.

ing with the mayor-judge in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), who retained one-half of any fines that he imposed, or the members of the Board of Optometrists in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), who stood to benefit from disciplining competitors, or the Alabama Supreme Court Justice in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986), whose pending suit would benefit from his ruling in a case before him, this Court has never closed its eyes to the risks that those in positions of trust might not be able to resist the "possible temptation" to put their own interests before their legal duties. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

Three terms ago the Court heard oral arguments in a case that applied some of these concerns to the role of a trustee. In *United Retail and Wholesale Employees* v. *Yahn & McDonnell*, 787 F.2d 128 (3d Cir. 1986), *aff'd* by an equally divided Court *sub nom. Pension Benefit Guarantee Corp.* v. *Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987), the Court of Appeals held that a withdrawing employer's due process rights were violated by a statute that allowed the trustees of the multi-employer pension plan to determine the withdrawing employer's liability to the fund. The Third Circuit recognized the conflict of interest between the desire of the trustees to increase the funds in the pension plan pool, and the duty to objectively adjudicate the withdrawing employer's liability. This case presents the Court with an opportunity to revisit some of these issues that were left undecided because of the division of the court in *Yahn & McDonnell*.

As Chief Justice Cardine put it, dissenting in this case: "one cannot help but wonder, why not give notice of the sale to the named beneficiaries." (App. A 10.) Perhaps the sale of the Rife Ranch was part of a scheme to benefit the purchasers and to hoodwink the Petitioner. Or per-

haps it was an effort by the personal representative to ignore the interests of the Petitioner. Or, perhaps the sale simply reflected a lack of concern by the co-personal representatives and trustee for the interests of Shriners Hospitals. After all, Petitioner did not even know that Mrs. Jones had created the trust for its benefit until after the sale was ordered.[16] Thus, one of the parties whose interest were most at stake was never permitted the opportunity to investigate or challenge the reasonableness of the sale. More process than this was clearly due.

II.

THE QUESTION IS SUBSTANTIAL

The Due Process issue in the instant case is fundamental to the diligent and faithful administration of charitable remainder trusts created by decedents. Major American charities like Shriners Hospitals For Crippled Children are the remaindermen of trusts administered in every state. The Internal Revenue Service advises that over 36,000 charitable remainder trusts filed federal tax returns in 1988. Although no figures are available for charities

[16] The position of Shriners Hospitals is quite different from that of the other charitable remainderman, the University of Utah. Prior to proposing the sale of the Rife Ranch, the Vice-President of First Security Bank of Utah had discussed the sale with the Executive Director of the University of Utah Office of Development, who indicated the University's reluctance to manage the land. (R. 499.) Such informal consultations were conducted by the Vice-President of First Security Bank of Utah with the life income beneficiary, the six individual legatees, and the University of Utah. Shriners Hospitals was the only interested party who was not consulted concerning the sale. One can only speculate as to whether Shriners Hospitals was kept in the dark because of some animus, or because of a suspicion that Shriners Hospitals would express interest in maintaining the Rife Ranch.

generally, the Council for Aid to Education estimates that known gifts of charitable remainder interests to approximately 1,500 private educational institutions amounted to roughly $1.8 billion in the period 1977 through 1988, or about 5.9 percent of all gifts by individuals to such institutions.[17] A recent sampling of 15 bank and trust companies revealed that they serve as trustees for 3,125 charitable remainder trusts, with assets totalling $727,358,347.[18] Petitioner alone has interests in over 2,300 trusts of which it is aware, with its share of assets totalling approximately $70 million.

The experience of Petitioner is that many state laws and rules do not require the personal representative of an estate or trustee of a charitable remainder trust to give notice to the charitable beneficiary of the implementation and funding of the trust. The result is that there are countless charitable remainder trusts under administration, with likely assets in the billions of dollars, of which the charitable beneficiaries have no knowledge. Petitioner and other charitable beneficiaries have no opportunity to know of such trusts, much less demand an accounting, or to seek redress from the fiduciary where nonfeasance or misfeasance occurs. As a result, testamentary charitable remainder beneficiaries are particularly susceptible to having their interests in the trusts diminished significantly by the actions of the personal representatives of the estates and/or the trustees. The personal representatives may fund the trusts with unwanted or un-

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[17] Council for Aid to Education, *Voluntary Support of Education 1987-1988*, at 7 (June 1989). The amount is slightly overestimated because it includes a small amount of life income gift annuities.

[18] E.G. Estes, *Managing Charitable Assets*, Fund Raising Management (Feb. 1990), at 26-36.

qualified assets or, as here, sell assets otherwise destined for the trusts at below fair market value. Moreover, the personal representatives may take any of a myriad of other actions which adversely affect the charitable beneficiaries' interests in the trusts. The requirements of due process frequently constitute the only mechanism by which charitable remaindermen can ensure that their interests are protected.

CONCLUSION

For the reasons stated, Petition for Writ of Certiorari should be granted.

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APPENDICES

APPENDIX A

In the Matter of the ESTATE OF
Velma Rife JONES, Deceased.
SHRINERS HOSPITALS FOR CRIPPLED
CHILDREN, Appellant (Petitioner),
v.
FIRST SECURITY BANK OF UTAH, N.A., Personal Representative, First Security Bank of Rock Springs, Resident Personal Representative; Rock Springs Grazing Association; Lazy VD Land and Livestock; Elza Eversole; and Lois M. Eversole, Appellees (Respondents).

No. 88-4.
Supreme Court of Wyoming.

March 21, 1989.

Contingent beneficiary of testamentary trust established in will sought to set aside sale of estate property. The District Court, Sweetwater County, Kenneth G. Hamm, J., denied motion, and appeal followed. The Supreme Court, Brown, J., Retired, held that contingent beneficiary of testamentary trust was not entitled to individual notice of proposed sale of estate asset.

Affirmed.

Cardine, C.J., dissented and filed an opinion in which Rooney, J., Retired, joined.

Rooney, J., Retired, filed dissenting opinion in which Cardine, C.J., joined.

* * * * *

Before CARDINE, C.J., THOMAS and MACY, JJ., ROONEY and BROWN, Retired, JJ.

BROWN, Justice, Retired.

Appellant Shriners Hospitals for Crippled Children (Shriners), a contingent beneficiary of a testamentary trust

established in the will of Velma Rife Jones, sought relief under W.R.C.P. 60(b) from an order authorizing and confirming the sale of estate assets. The district court denied the motion and Shriners appeals.

Shriners states the issues to be:

1. Whether Appellant has standing to claim relief under W.R.C.P., Rule 60(b).

2. Whether the District Court has the authority under W.R.C.P., Rule 60(b) to set aside the conveyance made pursuant to its Order Approving Sale Of Real Property And Confirmation Of Sale entered May 19, 1987.

3. Whether failure of Co-Personal Representatives to give Appellant the notice mandated by Wyo. Stat. (1977), §§ 2-7-615 and 2-7-205(b) nullifies the District Court's Order and Personal Representatives' Deed dated May 19, 1987.

4. Whether the purported sale of May 19, 1987 can be set aside because it was unnecessary and not in Appellant's best interest.

5. Whether it was reversible error for this Court to cut-off Appellant's discovery and to deny Appellant the opportunity for a full and fair hearing of its claim under W.R.C.P., Rule 60(b).

Answering the following question, similarly posed in Issue No. 3, effectively disposes of all the issues raised by Shriners: Is a contingent beneficiary of a testamentary trust entitled to separate and individual notice of a proposed sale of an estate asset in addition to notice given to the trustee? We answer that question in the negative and affirm the trial court.

Velma Rife Jones, a Utah resident, died testate on October 19, 1986. Her will contained specific bequests to several named cousins, if they survived her, and the residuary estate was left to appellee, First Security Bank of Utah, N.A., as trustee of a testamentary trust. Darrell

Rife Mork, the decedent's sister, was named as lifetime beneficiary of the trust income, with the remainder to Shriners and the University of Utah if they qualified as organizations described in §§ 170(c) and 2055(a) of the Internal Revenue Code.

The assets of the estate included a Wyoming ranch, and the will was consequently admitted to ancillary probate in Wyoming. Appellees, First Security Bank of Utah and First Security Bank of Rock Springs, were appointed co-personal representatives. Appellees Rock Springs Grazing Association, Lazy VD Land and Livestock, and Elza Eversole were interested in buying the ranch, which was appraised at $1.2 million in 1985, and was reappraised at $925,000 in August, 1987. They formed a joint venture called Southern Wyoming Cattle Company and made a cash offer of $820,000 to the co-personal representative, First Security Bank of Utah. The trust officer made minor modifications to the offer and Southern Wyoming Cattle Company accepted those terms.

The co-personal representatives filed a petition for authority to sell the real property as required by W.S. 2-7-614 (July 1980 Repl.). The asserted reasons for the sale were that

> the Estate is in need of liquid assets to pay the debts, specific bequests, costs of administration and taxes of the Estate and that the ultimate beneficiary of the Estate (a trust for the benefit of Darrell Rife Mork, the sister of Velma Rife Jones during her lifetime and then after her death two charities) has no desire to own or operate the Rife Ranch.

The petition further stated that

> [t]here has been filed herein Waiver of Notice of hearing of the above matter by the only beneficiaries of the Estate of Velma Rife Jones, Deceased, and Petitioners believe that no notice of the hearing of the Petition needs to be given.

Attached to the petition were waivers of notice executed by the recipients of the five specific will bequests and First Security Bank of Utah as trustee of the testamentary trust.[1] No notice was given to Shriners or the University of Utah. On May 19, 1987, the court entered an order approving and confirming the sale.

On July 6, 1987, Shriners filed a W.R.C.P. 60(b) motion for relief from the order, requesting the court to set aside the sale and declare it void. Shriners asserted that the failure to provide notice to the contingent beneficiaries or remaindermen violated the statutory notice requirements. The relevant notice statutes provide:

> Upon filing of the petition, the court shall fix the time and place of hearing of the petition, and *the personal representative shall give notice of the hearing as provided in W.S. 2-7-205*, * * *. At the hearing and upon satisfactory proof the court may order the sale, mortgage, exchange, pledge or lease of the property described or any part thereof at such price and upon such terms and conditions as the court may authorize.

W.S. 2-7-615 (July 1980 Repl.) (emphasis added).

> Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, *2-7-615*, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the date of hearing, the date for filing objections, or sale, as the case may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to *all of the beneficiaries named in the will of a decedent dying testate.*

W.S. 2-7-205(b) (July 1980 Repl.) (emphasis added).

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[1] The waiver from the bank initially states that First Interstate Bank of Utah is waiving notice. This no doubt is a typographical error.

Shriners asserted that it was one of the "beneficiaries named in the will" and was therefore entitled to notice. In response, the co-personal representatives argued that Shriners, as a trust beneficiary, was not entitled to notice, that Shriners was not entitled to file a motion for relief under W.R.C.P. 60(b), and that the motion for relief was an impermissible collateral attack on the district court's order. In disposing of the motion, the district court did not address the question of whether Shriners was one of the "beneficiaries named in the will" as that term is used in W.S. 2-7-205(b). Instead, the court relied on W.S. 2-7-620 (July 1980 Repl.), which provides:

> No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction.

Relying on *Hartt v. Brimmer*, 74 Wyo. 338, 287 P.2d 638 (1955) and *Security-First National Bank of Los Angeles v. Superior Court of Los Angeles County*, 1 Cal.2d 749, 37 P.2d 69 (1934), the district court concluded that the estate administration was an in rem proceeding and, because the court had jurisdiction over the property and the personal representative, failure of notice to Shriners was not a jurisdictional defect. In addition, the court apparently concluded that Shriners' motion constituted a collateral attack concerning a non-jurisdictional matter. Shriners appeals from the denial of its W.R.C.P. 60(b) motion.

Although our legal analysis of the issues in this case differs from that employed by the trial court, the end result is the same.

Shriners contends that it is a beneficiary under the will and that its interest is vested, rather than contingent, and as a vested beneficiary it was entitled to notice of the

proposed sale of an estate asset. In support of this reasoning, Shriners cites *In re Potter's Estate*, 396 P.2d 438 (Wyo. 1964); *McGinnis v. McGinnis*, 391 P.2d 927 (Wyo. 1964); and W.S. 2-7-402, 2-7-615 and 2-7-205. The cases cited by Shriners do not support its contentions.

Potter's Estate involved, among other things, the question of the vesting of real property in the heirs at law of a decedent who died intestate and the necessity of selling estate property. In that case, this court stated that "[o]nly the executor, administrator, spouse, next of kin, heirs, legatees, devisees, and creditors of the deceased or of the administration are parties interested in the estate." *In re Potter's Estate*, 396 P.2d at 447.

In support of its contention that it is a vested beneficiary or vested remainderman, Shriners cites *McGinnis*. That case has nothing to do with determining the nature of Shriners' interest. In *McGinnis*, a family owned a ranch and in 1941 assigned the oil and gas royalties in trust to a bank. In 1956, one family member received royalty payments and refused to pay the royalties to the trustee. The rest of the family sued the relative, and he defended on the grounds that the assignment was illegal on the basis of the "rule against perpetuities," and that it was an unreasonable restraint on alienation. This court held the trust was valid. Neither *McGinnis* nor *Potter's Estate* involves notice or lack of notice to contingent beneficiaries or contingent remaindermen and has no relevancy in the case before us.

Clearly Shriners' interest in the trust property is not vested. "[A] vested remainder is one which is limited to a person in being, whose right to the estate does not depend on the happening or failure of any future event. *Safe Deposit & Trust Co. v. Bowse*, 181 Md. 351, 29 A.2d 906 [(1943)]. 8 Maryland L.Rev. 142." 28 Am.Jur.2d Estates,

§ 242, n. 6 (1966). There is at least one future circumstance that would prevent Shriners from ever receiving any benefits under the trust—if, at the time of the death of the life beneficiary of the trust, Shriners is not an "organization described in Section 170(c) and Section 2055(a) of the Internal Revenue Code of 1954 as amended * * *." The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary or a contingent beneficiary. It still was not a "beneficiary named in the will."

W.S. 2-7-402 (July 1980 Repl.) states in pertinent part:

> Except as otherwise provided in this code, when a person dies the title to his property, real and personal, passes to the person to whom it is devised by his last will, or in the absence of such disposition to the persons who succeed to his estate as provided in this code. However, all of his property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law, * * *."

Under W.S. 2-7-402, title to decedent's property passed to the person to whom it was devised. In this case it passed to First Security-Utah, as trustee, not Shriners or the University of Utah.

W.S. 2-7-615 requires that notice of the hearing for the sale of real property to be given as provided in W.S. 2-7-205 (July 1980 Repl.) "to all of the beneficiaries named in the will of a decedent dying testate." W.S. 2-7-615 and 2-7-205 in combination simply provide that notice of a hearing for the sale of estate property be given to "beneficiaries named in the will of a decedent dying testate." In this case, the beneficiary named in the will is the First Security Bank of Utah, not Shriners or the University of Utah. Shriners and the University of Utah are contingent beneficiaries under the testamentary trust established by

decedent. Coincidentally, the terms of the will and the trust are set out in the same instrument, but each has independent life without regard to the other. Stated another way, the will is not dependent on the trust for its legal existence nor is the trust dependent on the will. Shriners cannot "bootstrap" its status as a contingent beneficiary under the trust to a beneficiary under the will just because the terms of the will and the terms of the trust are set out in the same instrument. Furthermore, just because the testator of the will and the trustor or settlor of the trust is the same person does not make the beneficiary of the trust also the beneficiary "named in the will."

Limiting the requirements of notice to the beneficiaries named in the will, as required by W.S. 2-7-205 and as we have done here, has practical significance. If the contingent beneficiaries of the trust were a large group of persons, an intolerable burden on the administration of the estate would develop and lead to expensive, endless and needless litigation if notice of the sale of an estate asset need be given to each individual contingent beneficiary under the testamentary trust.

Our holding in this case is simply that a contingent beneficiary of a testamentary trust is not entitled to individual notice of the proposed sale of an estate asset. This holding makes it unnecessary to address other issues raised by Shriners.

Affirmed.

CARDINE, C.J., files a dissenting opinion in which ROONEY, Retired J., joined.

ROONEY, Retired J., files a dissenting opinion in which CARDINE, C.J., joined.

CARDINE, Chief Justice, dissenting, with whom ROONEY, Justice, Retired, joins.

I would reverse.

On the issue of notice, Shriners advances two arguments. First, it asserts that it is one of the "beneficiaries named in the will" as that term appears in W.S. 2-7-205(b). Second, it argues that, because of its property interest in the estate, notice is required by the Due Process Clause of the United States Constitution. I would hold that appellant is correct on both counts. Shriners, however, was a "beneficiary" named in the will, and that alone was sufficient to require notice.

It is quite astonishing that the court concludes that contingent beneficiaries are not beneficiaries and therefore not entitled to notice of disposition at private sale of a significant asset. Even more astonishing is the suggestion that a will containing trust provisions is not a will or that trust provisions in a will are not part of the will. The instrument involved here is titled "Last Will and Testament of Velma Rife Jones." Within the body of the instrument is established a trust in which appellant is a named beneficiary. There is no settled law of which I am aware that permits the court to hold that what it does not like in a will simply is not in the will.

To complete this strange circle of result justification is the suggestion that some policy is served by denying notice because contingent beneficiaries may be "a large group of persons" and notice to them would be "expensive," an "intolerable burden" and lead to "endless * * * litigation." And so for expediency, the court approves this sale without the beneficiary, in whom title may ultimately vest, receiving notice or having the right to be heard. The result in this case was sale of a ranch first appraised for $1,200,000 being sold for the sum of $820,000. Perhaps the amount received for sale of the ranch was reasonable.

But one cannot help but wonder, why not give notice of the sale to named beneficiaries.

The Wyoming probate code does not define the term "beneficiaries." When construing statutes, however, "[w]ords and phrases shall be taken in their ordinary and usual sense" and "technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." W.S. 8-1-103. In its ordinary and usual sense, the term "beneficiary" means "one who receives something." Webster's Third New International Dictionary (1971). In law, "beneficiary," standing alone, is defined as "[o]ne who benefits from [the] act of another." Black's Law Dictionary (5th ed. 1979). Shriners surely receives something and benefits from the act of the testatrix, Velma Rife Jones. If it meets the qualifications set forth in the will, it is entitled to a remainder interest in the estate. In addition, Shriners is unquestionably "named in the will." Notice, therefore, was required by W.S. 2-7-615 and 2-7-205(b).

ROONEY, Retired Justice, dissenting, with whom CARDINE, C.J., joins.

I join in the dissent of Chief Justice Cardine. In addition to that said by him, I note that this is a *testamentary* trust. Contrary to that said in the majority opinion, it does not have any "independent life without regard to" the will, and it *is* "dependent on the will [for its legal existence]." Appellant benefits only because of the will, albeit through a trust established therein. As expressly set forth in the will, the intent of the testator was to benefit the appellant—not the trustee. Appellant was a beneficiary named in the will as provided in W.S. 2-7-615.

It would serve no purpose to address in this dissent the other issues presented in this case which become pertinent once appellant is recognized to be a beneficiary under the will. Whether or not I would find reversible error therein is not important.

APPENDIX B

In the Matter of the ESTATE OF
Velma Rife JONES, Deceased.
SHRINERS HOSPITALS FOR CRIPPLED
CHILDREN, Appellant (Petitioner),
v.
FIRST SECURITY BANK OF UTAH, N.A., Personal Representative, First Security Bank of Rock Springs, Resident Personal Representative, Rock Springs Grazing Association; Lazy VD Land and Livestock; Elza Eversole; and Lois M. Eversole, Appellees (Respondents).

No. 88-4.
Supreme Court of Wyoming.

Nov. 15, 1989.

On Rehearing of Appeal from the District Court of Sweetwater County; Kenneth G. Hamm, Judge.

* * * * *

Before CARDINE, C.J., THOMAS, MACY and GOLDEN, JJ., and ROONEY, J., Retired.

ORDER DENYING PETITION FOR REHEARING AND CONFIRMING PRIOR DECISION

CARDINE, Chief Justice.

This case came on before the Court upon the Petition for Reargument and Rehearing of Appellant, Shriners Hospitals for Crippled Children, filed on April 5, 1989; Appellant's Brief in Support of Petition for Reargument and Rehearing, filed April 5, 1989; Appellant's Supplemental Brief upon Rehearing Pursuant to the Court's Order Dated April 21, 1989, filed May 18, 1989; Answer of Appellees, Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole to

Petition for Reargument and Rehearing of Appellant, filed May 19, 1989; Brief on Rehearing of Appellees Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole, filed May 19, 1989; Answer and Supporting Brief on Rehearing of Appellees First Security Bank of Utah, N.A. and First Security Bank of Rock Springs, filed May 22, 1989; and Brief of Amicus Curiae University of Wyoming upon Rehearing, filed May 22, 1989; and the oral argument of counsel, and the Court, having reviewed the file and record of the Court and the opinion of the Court in *Matter of Estate of Jones*, 770 P.2d 1100 (Wyo. 1989), finds and holds that:

The primary interest of the University of Wyoming as amicus curiae is expressed in its statement of the issue as follows:

> "1. Whether the property interest of the remainderman of a charitable remainder trust is a contingent interest or vested interest subject to complete defeasance."

The Shriners Hospitals for Crippled Children also expressed concern about its categorization as a contingent beneficiary.

The Court is of the opinion that the prior decision of the Court should be confirmed insofar as it is expressed in the essence of the ratio decidendi:

> "The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary or a contingent beneficiary. It still was not a 'beneficiary named in the will.' " *Matter of Estate of Jones*, 770 P.2d at 1103.

The Court now is of the opinion that the description of the Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries of the testamentary trust is not a material concern with respect

to the disposition of this case. Consequently, the Court withdraws that categorization and those portions of the prior opinion that seem to depend upon, or discuss, the status of Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

The Court understands that the requirement in the testamentary trust that those beneficiaries qualify as organizations described in §§ 170(c) and 2055(a) of the Internal Revenue Code is verbiage that is necessary to assure that the trust will be treated as a charitable remainder trust by the Internal Revenue Service. Consequently, it would appear that the point made by the University of Wyoming as amicus curiae that these beneficiaries should be perceived as vested beneficiaries whose interest may be defeated by the loss of their status as a charitable organization is sound and should be respected. We do not deem it necessary to so hold, however, any more than we now deem it to have been necessary to identify Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

The crux of this case is that any beneficiary of a trust created in a will is not a beneficiary under the will for purposes of the notice requirements of §§ 2-7-615 and 2-7-205, W.S. 1977. We need make no further categorization of the status of Shriners Hospitals for Crippled Children than to conclude that it was not a "beneficiary under the will."

IT, THEREFORE, IS ORDERED that the Petition for Reargument and Rehearing of Appellant, Shriners Hospitals for Crippled Children, be, and the same hereby is, denied, and the opinion of the Court in *Matter of Estate of Jones*, 770 P.2d 1100 (Wyo. 1989), is confirmed except that it is modified to withdraw therefrom any categorization of Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

ROONEY, Justice, Retired.

I would have granted the petition for the reasons set forth in my dissent and in the dissent of Chief Justice Cardine.

APPENDIX C

(Letterhead Of)

THE STATE OF WYOMING
THIRD JUDICIAL DISTRICT

August 27, 1987

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Re: Estate of Velma Rife Jones
P-87-18

Gentlemen:

Section 2-7-620, W.S. 1977 provides:

> "No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction."

Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, et al., 37 P.2d 69 (Cal. 1934) seems particularly pertinent here, and I quote at some length from it:

> Will, supra; In re Lane's Estate, supra. The situation here presents at most a defect or irregularity in the service of the requisite notice."

As counsel notes:

> "The situation in the case at bar is nearly identical to *Hartt*. The only difference is that the activity at issue in the case at bar is a sale of estate property rather than admission of a will to probate. It is axiomatic that the sale of estate property is an in rem proceeding. Thus the factual difference between *Hartt* in the case at bar is of no import."

It is also clear that the Court had subject matter jurisdiction inasmuch as district courts have jurisdiction over probate matters, and also that the Court had jurisdiction over the real property and the personal representative.

Furthermore, as noted in Hartt, supra, whether the attack is collateral or direct is immaterial. The Court said, on page 654:

> "The authorities are divided on the question as to whether an action in equity to set aside a judgment or an order is a direct or a collateral attack. 31 Am. Jur. § 614, p. 206. The author of the Annotation in L.R.A. 1918D, 470 seems inclined to the view that it is a direct attack. See Poston v. Delfelder, 39 Wyo. 163, 270 P. 1068, 273 P. 176, on rehearing. We need not decide the point. *We think it makes no difference which view is taken so far as this case is concerned. The probate proceedings involved were proceedings in rem. The court had jurisdiction to enter the order admitting the will to probate. There was at most a defect or irregularity in the process. As we have seen, courts of equity are, to say the least, ordinarily hesitant to set aside a judgment for mere irregularity in the process,* see also 34 C.J.S., Executors and Administrators, §§ 527, 528, pp. 447, 448, note 92, and will not do so if the attack thereon is

> not made promptly and so belatedly as in the case at bar. The effect is the same as though the attack were collateral. See Poston v. Delfelder, supra, on rehearing. We do not say what should be the rule if a case of real hardship should be presented. We have no such case before us. We think the result herein should be the same even if we do not consider the probate court to be distinct from the district court."

It is questionable that the giving of notice to Shriners Hospital would have made any difference whatsoever. The original offer to buy was made April 28, 1987, a counter-offer made April 30, 1987 and accepted May 1, 1987. The petition for authority to sell was filed May 19, 1987, the sale was confirmed May 19, 1987, and on the same day various deeds were executed and delivered. It was not until July 6, 1987 that the Motion for Relief was filed by Shriners and only shortly before that that the alleged prospective purchaser disclosed that he was willing to pay a higher price for the property. Therefore, had Shriner been told of the pending sale for $820,000.00, it would not have had before it any other offer to consider. The University of Utah, on July 20, 1987, joined with Shriners' motion, yet the executive director of the University, on July 23, 1987, wrote the vice-president of the First Security Bank saying "It was wonderful news about the selling of the Wyoming property. I appreciate you keeping me informed."

There is some suggestion in the file that possibly the First Security Bank may have been remiss in failing to seek out other possible buyers. If that is so, perhaps Shriners' best remedy is to sue the bank for damages.

I regret that I have not addressed all of the issues presented in counsels' excellent briefs as is my general custom, but I am inundated at the moment, and feel that

the above approach resolves the problem. However, I also adopt by this reference all other legal arguments and principles submitted by counsel for the purchasers and the First Security Bank, in support of their position to the extent they are applicable. Shriners' counsel is also reminded that all briefs are required to be on 8 ½ x 11 paper by Rule 403 of the Uniform Rules for the District Courts.

Mr. Ragsdale will please prepare an order denying the Motion, send a copy to Mr. Burgess and Mr. Finn and the original to me for signature.

By The Court,

/s/ KENNETH G. HAMM
Kenneth G. Hamm
District Judge

KGH/cjv

C7

November 4, 1987

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Re: Estate of Velma Rife Jones
P-87-18

Gentlemen:

The opinion I write on the above matter, dated August 27, 1987, was based upon a point of law. That point of law was that the proceedings concerning the sale of the property could not be collaterally attacked. Therefore, as I saw it then and see it now, further discovery will not change that point of law. Pace v. Hadley is not applicable as far as this case is concerned.

Accordingly, movants Objections To Proposed Order Denying Motion For Relief From Order Under Wyoming Rules of Civil Procedure, Rule 60(b) of Shriner's Hospitals For Crippled Children are denied.

By The Court,

/s/ KENNETH G. HAMM
Kenneth G. Hamm
District Judge

KGH/cjv

APPENDIX D

U.S.C.A. Const. Amend. 14

* * *

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 2. Notices

§ 2-7-202. Public auction of real or personal property; contents.

(a) When a sale or real or personal property of a decedent is ordered and is to be made at public auction, notice of the time and place of sale shall be published in a daily or weekly newspaper of general circulation in the county in which the probate is pending and in the county in which such property is situated once a week for three (3) consecutive weeks next before the sale, except in the case of perishable and other personal property likely to depreciate in value or which will incur loss by being kept, and as much other personal property as may be necessary to pay the allowance made to the family of the decedent.

(b) Notice shall set forth the time and place of sale and a description of the property offered for sale, and may provide that any and all bids may be rejected by the personal representative.

(c) A copy of the notice shall also be mailed as provided in W.S. 2-7-205.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 2. Notices

§ 2-7-205. Parties entitled to receive.

(a) A true copy of the notice required in W.S. 2-7-201 shall be mailed by ordinary United States mail, first class, to:

(i) The surviving spouse, if any, and to all of the heirs at law of the decedent and to all of the beneficiaries named in the will of the decedent. The mailings shall be made not later than one (1) week after the first publication of the notice in the newspaper; and

(ii) Each creditor of the decedent whose identity is reasonably ascertainable by the personal representative within the time limited in the notice to creditors. The mailing shall be made not later than thirty (30) days prior to the expiration of three (3) months after the first publication of the notice in the newspaper.

(b) Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, 2-7-615, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the day of hearing, the date for filing objections, or sale, as the case may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(c) Notice of all intended sales of real property not requiring an order of the court shall be mailed or delivered not less than ten (10) days prior to the sale to the surviving spouse, if any, and to the heirs of a decedent dying

intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1; 1989, ch. 114, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-614. Petition to sell, etc.; generally.

A petition to sell, mortgage, exchange, pledge or lease any real or personal property shall set forth the reasons for the petition and describe the property involved. It may apply for different authority as to separate parts of the property, or it may apply in the alternative for authority to sell, mortgage, exchange, pledge or lease. Whenever it is for the best interests of the estate, real and personal propety of the estate may be sold, mortgaged, exchanged, pledged or leased as a unit.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-615. Petition to sell, etc.; notice and hearing; exception; court order.

Upon filing of the petition, the court shall fix the time and place of hearing of the petition, and the personal representative shall give notice of the hearing as provided in W.S. 2-7-205, but as to personal property and as to the lease of real property not specifically devised for a period of not to exceed one (1) year, the court may hear the petition without notice. In those instances where notice is required, the notice shall state briefly the nature of the petition. At the hearing and upon satisfactory proof the court may order the sale, mortgage, exchange, pledge or lease

of the property described or any part thereof at such price and upon such terms and conditions as the court may authorize.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-620. Collateral attacks precluded.

No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)